See 104 Wn 2d 115 (1985)

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF CITY OF MARYSVILLE, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 81-52, 81-53 81-54, 81-58, 81-59 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the consolidated appeals of five $250 civil penalties for the alleged violation of section 9.11(a), came before the Pollution Control Hearings Board; Nat Washington, Chairman, Gayle Rothrock, and David Akana (presiding), at a formal hearing in Marysville on June 8, 1981.

Respondent was represented by its attorney, Keith D. McGoffin; appellant was represented by James H. Allendoerfer, City Attorney. Court reporter Carolyn Koinzan recorded the proceedings.

Having heard the testimony, having examined the exhibits, and

having considered the contentions of the parties, the Board makes thes.

FINDINGS OF FACT

I

Respondent Puget Sound Air Pollution Control Agency (hereinafter "respondent") is an agency created by chapter 70.94 RCW with jurisdiction in Pierce, King, Snohomish and Kitsap counties.

II

Appellant City of Marysville (hereinafter "appellant") is a municipal corporation of the state and is located in Snohomish County.

III

Appellant maintains and operates a sewer lagoon at the terminus of 47th Avenue NE in Marysville. The thirty-six acre, four foot deep lagoon, completed in 1960, processes about 600,000 gallons of effluent each day and serves 10,000 people through 3,600 connections. The bulk of the effluent load comes from downtown Marysville; industry waste is not a significant part of the load. The average retention time of effluent in the lagoon is thirty days. The capacity of the system in terms of Biological Oxygen Demand (BOD) is about one half of the maximum allowed by state standards. However, other criteria require the area of the lagoon to be expanded before additional connections are made.

IV

On March 6, 1981, respondent's inspector investigated a complaint of odor from a resident (Olson) living 250 feet east of the sewer lagoon. No odor was noticed by the inspector. The inspector advised

appellant's employees at the facility of the complaint. No further action was taken by respondent for this event.

V

On March 8, 1981, at about 1:00 p.m., a complaint of odor by Olson was registered at respondent's office. Investigation on March 9 could not confirm the odor. No further action was taken by respondent.

VI

On March 10, 1981, at about 2:35 p.m., respondent's inspector investigated complaints of odor by Mr. and Mrs. Olson. The inspector noticed a slight odor at the Olson's residence. No further action was taken.

VII

On March 15, 1981, at about 7:55 p.m., respondent's inspector again investigated complaints of odor at the Olson's residence. The inspector noticed an odor which was of such character as would cause him to try to avoid it during the entire period of his investigation. As a result of the investigation, two notices of violations of Section 9.11(a) were delivered to appellant from which followed a $250 civil penalty and the first appeal.

VIII

On March 17, 1981, at about 4:40 p.m., respondent's inspector investigated another complaint of odor at the Olson's residence. The odor was constant during the period of his investigation and was of such character as would cause him to try to avoid it. Appellant was advised of the event. Two notices of violation of Section 9.11(a)

were issued from which followed a $250 civil penalty and the second appeal.

IX

On March 19, 1981, at about 3:30 p.m., and again on March 27, 1981, at about 3:10 p.m., respondent's inspector visited the Olson's residence in response to a complaint of odor. On each visit, the inspector noticed a constant odor during the period of his stay, of such character as would cause him to try to avoid it. A notice of violation of Section 9.11(a) was issued for each event from which followed a $250 civil penalty for each day and the third and fourth appeals.

X

On March 24, 1981, respondent received a complaint of odor at the Olson's residence but could not verify its presence.

XI

On March 29, 1981, at about 6:00 p.m., respondent's inspector visited the Olson's residence in response to an odor complaint. The inspector noticed a distinct and definite odor of an unpleasant characteristic. A notice of violation of Section 9.11(a) was issued to appellant from which followed a $250 civil penalty and the fifth appeal. After March 29, the odor emissions decreased and have not been the basis of further enforcement action.

XII

Winds from the southwest, west and northwest can carry odors from the lagoon to complainant's residence. Winds from the west could also bring odors from the Tulalip sanitary landfill which is located west

of complainants' house. The inspector cannot differentiate the odor from the landfill and lagoon if they are combined. On March 19 the wind came from the northwest; on March 27 the wind came from the southwest. On the other ocassions in question, the winds could have come from the west bringing odors from the landfill. The inspector's impression is that no odor is released from the landfill; we find otherwise.

XIII

Complainants resided on six acres located east of appellant's lagoon. The acreage is maintained as pasture and garden. Property immediately to the north is similarly used; beyond that are located light industry uses. The property to the east is in pasture.

Complainants have resided at the site for five years. Odor, described as septic tank effluent smell, was first detected in June, 1980. The smell may last from about 20 minutes to several hours on any occasion. The presence of the smell confines children indoors and limits entertaining, gardening and other outdoor activities. The Olsons have also experienced headaches from the odor. The odor did not reoccur after the March 29 complaint.

XIV

After receiving the violation notices in March, appellant increased the lagoon water elevation eleven inches. Coincidentally, there have been no further odor enforcement action taken after March, 1981 by respondent.

Appellant has also continued its long standing program to control the addition of new sewer connections and add additional area to

the lagoon, increase dike heights, and add a chlorination facility. These improvements will be completed in December, 1981 at a cost of $800,000. Circulation of the effluent in the lagoon is expected to improve allowing an increase in service capacity to 17,000 people.

XV

Appellant attributes any odor from the lagoon as the result of natural causes occurring in the spring and fall. Because of a change in the weather, sludge on the bottom of the lagoon turns over causing odor to increase. Odor can also result in places where there is no circulation in the lagoon. Odor can also result in June from algae "bloom and die off." While there are other causes for a lagoon to smell, the foregoing causes are the most likely in this case. We find the poor circulation in certain areas to be the cause most consistent with the facts presented.

XVI

Pursuant to RCW 43.21B.260 respondent has filed with the Board a certified copy of its Regulation I and amendments thereto which are noticed.

XVII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisidiction over the persons and over the subject

matter of this proceeding. Appellant is a "person" within the meaning of RCW 70.94.030(3) and is subject to the requirements of the Act.

II

Section 9.11(a) of Regulation I provides that:

> It shall be unlawful for any person to cause or permit the emission of an air contaminant or water vapor, including an air contaminant whose emission is not otherwise prohibited by this Regulation, if the air contaminant or water vapor causes detriment to the health, safety or welfare of any person, or causes damage to property or business.

Compare WAC 173-400-040(5).

"Air contaminant" is "dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof." Section 1.07(b); RCW 70.94.030(1). "Emission" is the "release into the outdoor atmosphere of air contaminants." Section 1.07(j); RCW 70.94.030(8). Air pollution is defined as:

> . . . presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interfere with enjoyment of life and property. Section 1.07(c). RCW 70.94.030(2).

Section 9.11(a) thus makes "air pollution" unlawful. Therefore, when an odor is present in the outdoor atmosphere in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property, Section 9.11(a) is violated. In interpreting Section 9.11(a), the

fundamental inquiry is not whether the use to which property is put is reasonable or unreasonable, but whether air pollution is of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property. It matters not for purposes of finding a violation, under Section 9.11(a), that an odor results from changes in the weather if appellant maintains and operates an air pollution source. The violation is complete once an unlawful odor is found. The circumstances surrounding the odorous event does matter for purposes of mitigation of a civil penalty, however.

In the instant cases, respondent did not prove injury to human health, plant or animal life, or property. In determining whether the air pollution unreasonably interferes with enjoyment of life and property--the remaining issue--we note that the precise degree of discomfort and annoyance experienced cannot be definitely stated. Suffice it to say that complainants should be persons of ordinary and normal sensibilities.[1] Respondent must prove its case by a

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1. "Where the invasion affects the physical condition of the plaintiff's land, the substantial character of the interference is seldom in doubt. But where it involves mere personal discomfort or annoyance, some other standard must obviously be adopted than the personal tastes, susceptibilities and idiosyncracies of the particular plaintiff. The standard must necessarily be that of definite offensiveness, inconvenience or annoyance to the normal person in the community--the nuisance must affect 'the ordinary

preponderance of the evidence. In weighing such evidence, we conclude that odor from appellant's sewer lagoon on March 19 and 27, 1981, were an unreasonable and substantial discomfort and annoyance to persons of ordinary and normal sensibilities. We further conclude that it is practicable for appellant to reduce its odor by avoiding poor pond circulation. If the odor cannot be controlled, which appears not to be the case here, appellant may wish to apply for a variance under Article 7 of Regulation I.

We conclude that respondent did not show, by a preponderance of the evidence, that appellant caused or allowed an unlawful odor on March 15, 17 and 29, 1981.

III

RCW 70.94.040 makes it unlawful for any person to cause or permit air pollution in violation of any regulation promulgated under it. The provision imposes strict liability upon violators. Sections 9.11(a) and 3.29 of Regulation I similarly provide for strict liability for violations. Compare Puget Sound Air Pollution Control Agency v. Kaiser Aluminum & Chemical Corporation, 25 Wn. App 273 (1980), petition for review denied, 93 Wn.2d 1023 (1980).

IV

Appellant violated Section 9.11(a) on March 19 and 27, 1981 as alleged and each $250 civil penalty assessed pursuant to Section 3.29

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1. Cont.

> comfort of human existence as understood by the American people in their present state of enlightenment.' Prosser, Law of Torts (1971) p. 758 (citiitions omitted).

is reasonable in amount and should be affirmed.

Appellant was not shown to have caused or allowed an odor on March 15, 17 and 29, 1981 and the $250 civil penalties on those days should be reversed.

V

Appellants remaining contentions have been considered and determined to be without merit.

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

1. The $250 civil penalties issued for violation on March 19, 1981 (PCHB No. 81-54) and March 27, 1981 (PCHB No. 81-58) are affirmed.

2. The $250 civil penalties issued for violations on March 15, 1981 (PCHB No. 81-52), March 17, 1981 (PCHB No. 81-53), and March 29, 1981 (PCHB No. 81-59) are reversed.

DONE this 14th day of July, 1981.

POLLUTION CONTROL HEARINGS BOARD

NAT W. WASHINGTON, Chairman

GAYLE ROTHROCK, Member

DAVID AKANA, Member